SUMMARY ABATEMENT OF NUISANCES BY BOARDS OF HEALTH.

The effectiveness of all public health laws depends in last analysis upon the powers of the boards of health and health officers summarily to abate nuisances. But the powers which may be given to such officers are of such a character that their exercise may result in a serious invasion of the rights both of property and personal liberty. The abatement of unsanitary conditions may easily, and, as a matter of fact, does usually involve such a serious restriction of the right freely to use property that the value of the property affected may be seriously diminished, while the claim, often made by health officers, of the right in times of smallpox epidemics to vaccinate all persons who have been exposed to contagion, or to place in a hospital for contagious diseases one who is suffering from smallpox, will, if recognized, of necessity result in a most serious invasion of that right to control one's own person which is of the very essence of the right of personal liberty.

It is thus apparently impossible to reconcile the protection of the public welfare with that of private rights. It is therefore necessary, in order to reach a satisfactory solution of the questions involved in the exercise of their powers by health officers, that care be taken, on the one hand, not to permit the desire to protect private rights to be given such weight as to endanger the public safety; and, on the other hand, to see to it that the powers of health officers are so exercised and are subject to such judicial control that private rights shall not be sacrificed, except in the interest of the public welfare.

On account of the Fourteenth Amendment of the United States Constitution and of provisions of a similar character to be found in most of the State constitutions, which prevent the taking of property or the depriving of liberty without due process of law, the whole matter of the abate-

ment of nuisances fortunately is subject to judicial control. Not merely the actions of health officers in applying a law, like similar actions of all administrative officers, but also the powers which the legislature may grant to health officers are subject to the control of the courts. This control, further, is exercised both by the State courts and the Federal courts. Finally, inasmuch as the constitutional provisions on which this control is based are found in both the Federal and the State constitutions, we may have a Federal rule and a State rule as to what is due process of law, and these rules may differ, if the State rule is more rigorous than the Federal rule, since there is no appeal to the Federal courts from a decision of a State court that an act of a State legislature is violative of either the Federal or the State constitution.

What now under the decisions of the Supreme Court of the United States and under the decisions of the State courts are the powers which may be granted to health officers? In order to answer this question, let us analyze the actions of a board of health in summarily abating a nuisance.

An analysis of such action will result in the recognition of three distinct actions: First, the determination that things of a given class are nuisances; second, the determination that a concrete state of facts falls within a class of things which have been held to be nuisances; and third, the causing of such concrete state of facts to cease to exist, by action taken independently of any other authority. The independence of this action is what constitutes its summary character. The judicial remedies offered to the individual may be against any one of these three actions taken by health officers. But as a result of our legal history, which has from a very early time permitted summary actions of the third class which has been distinguished, these remedies are almost exclusively devoted to a review of the first two classes of actions and particularly to the first class of actions, that is to the determination that a class of things are nuisances. Let us take up these three classes of actions, and,

First, The power to declare classes of things to be nuisances. Here it is well to remember, first, that, as a result of a long line of decisions certain classes of things are what are

known as common law nuisances; second, that the legislature may itself declare certain things to be nuisances, and third, may delegate to administrative bodies the right to declare to be nuisances certain conditions existing within the territory over which they have jurisdiction.

So far as common law nuisances are concerned, the courts are supreme, for they and they alone finally interpret the common law. Boards of health have therefore no power to enlarge the field of common law nuisances. So far as concerns the second and third classes, the powers of the courts are equally broad, for they have planted themselves upon the principle that, while the legislature and its delegate may declare things to be nuisances which are not nuisances without such action, are not, in other words common law nuisances, neither the legislature nor its delegate may declare to be a nuisance what is really not a nuisance. Thus in the case of Yates *v.* Milwaukee,[1] the Supreme Court of the United States enjoined the City of Milwaukee from proceeding to remove a wharf which projected beyond a dock line established by such city under authority of a State statute authorizing the city to restrain encroachments and obstructions upon a river. In the course of the opinion, Mr. Justice Miller says: "It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the State within which a given structure can be shown to be a nuisance, can by its mere declaration that it is one, subject it to removal. * * * We are of opinion that the City of Milwaukee cannot by creating a mere artificial and imaginary dock line hundreds of feet away from the navigated part of the river and without making the river navigable up to that line, deprive riparian owners of the rights to avail themselves of the navigable channels by building wharves and docks to it for that purpose."

Thus again the New York Court of Appeals has held that the legislature may not prohibit the making of cigars in tenement houses in cities of over 500,000 inhabitants.[2] In the course of the opinion it is said: "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public

[1] 10 Wall. 497. [2] Matter of Jacobs, 98 N. Y. 98.

comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for public health and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title of the act or in its body declare that it is intended for the improvement of the public health. Such a declaration does not preclude the courts and they must yet determine the fact declared and enforce the supreme law."

Further, the legislature may, subject to these same limitations, delegate the power to declare classes of things to be nuisances to local bodies and local boards of health.[1] Thus, for example, it has been held that the legislature may delegate to the counsel of a municipal corporation the right to pass ordinance providing for the compulsory vaccination of all inhabitants of the city and preventing children from going to school who have not been vaccinated.[2] It has, however, been held that a general power to supervise the public health and to pass regulations whose purpose is to prevent the spread of contagious diseases will not justify the passage by a State board of health of an order that all children must be vaccinated before they are permitted to attend the public schools, where there is no immediate danger of an epidemic of smallpox in the particular locality to which the order may refer.[3] It has even been intimated that the legislature may not under any conditions vest such a legislative power in a board of health.[4] A similar decision has been reached in New

[1] People *v.* Polinsky, 73 N. Y. 65; Metropolitan Board of Health *v.* Heister, 37 N. Y. 661.

[2] Morris *v.* Columbus, 102 Ga. 792; Duffield *v.* School District, 162 Pa. St. 456. See also Abeel *v.* Clark, 84 Cal. 226.

[3] See Potts *v.* Green, 167 Ill. 67. [4] See State *v.* Burdge, 95 Wis. 390.

York, where it has been held that the authority to isolate persons exposed to contagious diseases does not, where vaccination is not compulsory by law, justify the quarantining of one who refuses to be vaccinated and who is not shown to have been exposed to contagious disease except by evidence that he has been carrying on an express business in a neighborhood in which many cases of smallpox have existed.[1] In another New York case,[2] decided in 1895, the judge says, "To vaccinate a person against his will without legal authority so to do is an assault."

Second: The determination that given conditions fall within a well-recognized class of nuisances. The main question which arises here is whether it is within the power of the legislature to confer upon administrative authorities the power finally to determine that certain conditions fall within a well-recognized class of nuisances.

There are very few cases upon this point, although there are numerous *dicta* which are absolutely conflicting. Let us consider the question first from the point of view of the Constitution of the United States; in other words let us see what is the due process of law called for by the Fourteenth Amendment. For the main, if not the only, objection to vesting this power of final determination in boards of health or administrative bodies generally is that an administrative proceeding which finally determines is not due process of law.

The United States Supreme Court has consistently refused to give us a definition of due process of law, preferring to decide as concrete cases come before it whether the methods followed in such cases are consistent with the Constitution. Thus it is said in Davidson *v.* New Orleans[3]: "It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States. * * * In fact it would seem from the character of many of the cases before us and the arguments made in them that the clause

[1] *In re* Smith, 114 N. Y. 68. [2] Matter of Walters, 84 Hun, 457.
[3] 97 U. S. 108.

under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty or property without due process of law in terms which would cover every exercise of power thus forbidden by the State and exclude those which are not, no more useful construction could be furnished by this or by any other court to any part of the fundamental law.

"But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom we think in the ascertaining of the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the Federal Government or limitations imposed upon the States."

The statement made by the Supreme Court which approaches most nearly to a definition of due process of law is that made in the case of Pennoyer *v.* Neff,[1] where it is said that due process of law, so far as concerns judicial proceedings, means "the course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection of private rights. To give such proceedings any validity there must be a tribunal competent by its jurisdiction—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant he must be brought within its jurisdiction by service of process within the State or his voluntary appearance."

Further the court has said[2] that due process of law 'does not necessarily imply that all trials in the State

[1] 95 U. S. 714. [2] Walker *v.* Sauvinet, 92 U. S. 90.

courts affecting the property of persons must be by jury. The requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States. Art. 6 Const. Here the State court has decided that the proceeding [that is, a trial in a civil case without a jury] was in accordance with the law of the State, and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

These two decisions would indicate, first, that due process of law is to be determined by the State legislature, subject to the approval of the United States Supreme Court; and second, that any judicial proceeding is due process of law where the tribunal, before which the proceeding is had, has by the law of the State jurisdiction of the subject matter, and, in case of a determination of personal liability, where the defendant has notice and an opportunity to be heard.

These cases do not, however, decide whether, if these conditions are observed, a final determination by an administrative authority is due process of law, but several other decisions of the Supreme Court have settled the question that in the classes of cases to which they refer such a determination is due process of law.

In the first place it has been held that, if the law so provides, the ascertainment by the administrative officers of the government of the amount of indebtedness due the government from one of its officers who is a receiver of public moneys, is due process of law, even if the law provides that the indebtedness so determined is to be collected summarily without resort to the courts; in other words, that it is due process of law to provide that the determination of administrative officers shall in such cases have the force and effect of the judgment of a court.[1]

[1] Murray's Lessee *v.* Hoboken Land & Improvement Co., 18 How. 372.

In the second place the determination by administrative officers of the amount of taxes a given individual shall pay is held, in the case of a license tax, to be due process of law, even if such individual has had no opportunity to be heard before the authority assessing the tax, provided, however, that the law gives such individual the power to sue out an injunction to restrain the collection of the tax.[1]

Finally, it is held that it is due process of law to vest in administrative officers the final determination as to the right of an alien to land in the United States under a statute excluding certain classes of aliens from admission into the United States. In the case of Nishimura Ekiu *v.* United States[2] Mr. Justice Gray, who delivered the opinion of the court, said: "The final determination of these facts [that is the facts on which the right of an alien to land depends] may be entrusted by Congress to executive officers, and in such a case as in all others in which a statute gives a discretionary power to an officer to be exercised by him upon his sole opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."

On their face these decisions, or rather the opinions in which they are given, would seem to go a long way towards laying down the rule that it is perfectly consistent with due process of law to vest in administrative officers the final determination, after a hearing of the persons concerned, of facts upon which the right to property or liberty depends. On the other hand it is to be remembered that these cases, that is, cases of government officials, tax cases and cases of the admission of aliens were decided largely in view either of historical considerations or of the plenary power of the government to expel aliens. One noticeable reason for the decision both in the case of Murray's Lessee *v.* The Hoboken Land & Improvement Company, and in that of McMillen *v.* Anderson was the historical usage of the English Crown and the American Governments, while the fact that Ekiu was an alien who never had a domicile in the United States, had just as much effect on the decision

[1] McMillin *v.* Anderson, 95 U. S. 37. [2] 142 U. S. 651.

in her case. It cannot therefore be said that under the decisions of the United States Supreme Court it is at all certain that the final determination of the existence of a nuisance may constitutionally be vested in a board of health.

When we come to the consideration of the rule, as it has been laid down by the courts of the various States, we cannot be much more certain than we are in the case of the decisions of the United States Supreme Court, for, while there are a number of cases which would seem to indicate that this power of final determination may constitutionally be vested in boards of health, these cases are as a rule pretty early in point of time, and the later *dicta* of the courts would seem to indicate a tendency to depart from the early rule. The decisions which have been made upon this subject may be put into two classes: In the first class are those which recognize that the determination of boards of health with regard to the existence of a nuisance is, provided a hearing is given to the party affected, final, so far as any collateral proceeding is concerned. But, a condition of the finality of such a determination of an administrative authority, is the possibility of reviewing it by some direct judicial proceeding like *certiorari*. When it is remembered that at the time these decisions were made *certiorari* was made use of merely to review questions of jurisdiction and regularity of proceedings, it will be seen that the finality of the determination upon the question of fact was really not much encroached upon. It may therefore be said that this first class of decisions goes a long way towards supporting the proposition that the determination of a board of health as to the existence of a nuisance may constitutionally be made final. The decisions in question are Van Wormer *v.* The Mayor, &c., of Albany,[1] and Green *v.* The Mayor of Savannah.[2] In the former case it was held that a determination, made after a hearing, that a thing was a nuisance, not overruled by direct proceedings, such as *certiorari*, could not be reviewed in an action for trespass brought against a health officer, and that it was not error in such an action to refuse evidence that the thing complained of was not actually a nuisance. In

[1] 15 Wend. 162. [2] 6 Ga. 1.

the second case the legislature had given the city council the right to prohibit the growing of rice within a certain distance of the City of Savannah. The council passed an ordinance to that effect, which required the mayor to order anyone growing such rice to destroy it if growing, or to appear before the council at the time and place to be specified in the order to show cause why the rice should not be destroyed. Green received such an order from the mayor and appeared by introducing testimony, whereon the council ordered the growing rice to be destroyed. Appeal was taken to the courts to review by *certiorari* this decision. The court refused to issue the writ on the ground that the decision of the council was final.

The second class of cases seems to consider that such a determination may be made final regardless of the possibility of reviewing it in any direct proceeding. These are Kennedy *v.* The Board of Health,[1] and Metropolitan Board of Health *v.* Heister.[2] The first case holds that a determination of a board of health that a thing is a nuisance is final under the Pennsylvania statute, and that on a suit to collect expenses or abate the nuisance the defendants could not offer evidence to show that there was no nuisance. In the second case the court says: "Before leaving the consideration of this constitutional objection [namely that one is being deprived of property without due process of law and without trial by jury], it ought, perhaps, to be observed that the act provides for notice to the party affected, before the judgment finally passed against him. In substance the board upon the evidence before it determine that the *prima facie* case exists requiring their action. In the present instance after such preliminary determination made, notice was given to Heister of what had been done and that he could be heard upon the subject, with his witnesses, at a time designated. This gave the same protection to all of his rights as if notice had been served upon him before any preliminary proceedings had been taken. He refuses to litigate before the courts the question whether his pursuit is dangerous to the public health. He cannot complain now that their judgment upon the facts is to be held conclusive upon him." As a result the court refused to issue an injunc-

[1] 2 Pa. St. 366. [2] 37 N. Y. 661.

tion to prevent the enforcement of the order of the board of health to abate the nuisance.

It may be said, therefore, that the cases actually decided on this point recognize that the power of determining finally the existence of a nuisance may be vested in a board of health, certainly, so far as subsequent collateral proceedings are concerned, while some of the cases would seem to go to the extent of recognizing the finality of such a determination, even in direct proceedings taken to review it.

In support of the rule thus laid down are to be found a number of *dicta* in the State courts. The strongest of these is that found in Salem *v.* The Eastern R. R. Co.[1] In this case a board of health acting under the authority of a State statute ordered a railroad company to abate a nuisance, and, on the failure of the company to obey the order, proceeded itself to abate the nuisance. After abatement the board brought an action to recover the expenses caused by its action. The principal question before the court was whether the determination of the board of health that a nuisance existed was subject to review in such an action. The court held that it was, but because the board was attempting to impose upon the railroad company a personal liability. In the course of its opinion the court said the determination by a board of health "of questions of discretion and judgment in the discharge of their duties is undoubtedly in the nature of a judicial decision, and within the scope of the power conferred and for the purposes for which the determination is required to be made it is conclusive. It is not to be impeached or set aside for error or mistake of judgment, or to be reviewed in the light of new or additional facts. The officer or board to whom such determination is confided, and all those employed to carry it into effect or who may have occasion to act upon it are protected by it and may safely rely upon its validity for their defence."

This *dictum* would seem to extend the principle that was laid down in the cases to which reference has been made beyond the rule which the United States Supreme Court and the State courts have recognized, namely, that a deter-

[1] 98 Mass. 431.

mination made by an administrative authority after a hearing and notice might be made final. So far, however, as it adopts the principle of the finality of the determination of the board of health as to the existence of the nuisance where no attempt is made to impose a personal liability on anyone charged with maintaining such nuisance, it must be considered as in line with the cases to which reference has been made.

Another *dictum* is to be found in a recent case in the New York Court of Appeals, namely, People *ex rel.* Copcutt *v.* The Board of Health.[1] This case decided that a *certiorari* would not issue to review a decision of a board of health that a nuisance existed where no opportunity to be heard had been given by law to the persons whose maintenance of the nuisance was complained of, since such a decision was not a judicial act, and a *certiorari* is not under the New York decisions to be issued except to review a judicial act. In the course of the opinion Judge Earl said: "The question may be asked, how can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the constitution securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises whereon they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as a matter of favor, but as a matter of right, and the right to a hearing must be found in the act." This *dictum* it is true is not nearly so strong as that in Salem *v.* The Eastern R. R. Co., but it cannot be denied that it would seem to intimate that in case a determination had been reached after a hearing which had been guaranteed to the individual by the statute, such determination might constitutionally be made final.

[1] 140 N. Y. 1.

Opposed to the rule laid down in these decisions and these *dicta* is a *dictum* in a recent case in the Court of Appeals, namely, Department of Health of New York City *v.* The Rector, &c., of Trinity Church.[1] This case decided that a penalty might be recovered for violation of an order of the Health Department to comply with the law requiring " water to be furnished in sufficient quantity at one or more places in each floor " of any house occupied by one or more families, although such order was given without notice. In the course of the opinion Judge Peckham says: " Where property of an individual is to be condemned and abated as a nuisance it must be that somewhere between the institution of the proceedings and the final result the owner shall be heard in the courts upon that question, or else he shall have an opportunity when calling upon those persons to destroy his property to account for the same, to show that the alleged nuisance was not in fact. No decision of a board of health, even if made on a hearing, can conclude the owner upon the question of nuisance."

In support of this statement the judge cites the Copcutt case which, as has been shown, does not support the proposition here made, and the case of Miller *v.* Horton,[2] which merely says that the decision is subject to review where there is no notice or hearing. It is indeed true that the opinion in Miller *v.* Horton does disapprove of the *dictum* in Salem *v.* The Eastern R. R. Co. as to the finality of the determination of a health board as to the existence of a nuisance. But it will be remembered that this *dictum* claimed finality for a determination made without notice or a hearing. Judge Peckham finally cites the case of Hutton *v.* The City of Camden.[3] This case decided that a determination of a board of health made without a hearing and otherwise in a distinctly irregular way would be reviewed by the courts in an action to recover expenses caused by the action of the court in abating a nuisance not abated by the person maintaining it after he had received an abatement order from the board of health, but while the decision is not in point, there is a *dictum* in the opinion which supports the position taken by Judge Peckham. It is said: " There is an infirmity in all proceedings of this nature which lies deeper

[1] 145 N. Y. 32. [2] 152 Mass. 540. [3] 39 N. J. Law, 122.

than the one just noted. Assuming the power in this board derived from the legislature to adjudge the facts of the existence of a nuisance, and also assuming such jurisdiction to have been regularly exercised and upon notice to the parties interested, still I think it is obvious that in a case such as that before this court, the finding of the sanitary board cannot operate in any respect as a judgment at law upon the rights involved. It will require but little reflection to satisfy any mind, accustomed to judge by legal standards, of the truth of this remark. To fully estimate the character and extent of the power claimed will conduct to its instant rejection. The authority to decide when a nuisance exists is an authority to find facts, to estimate their force and to apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class of important interests. The use of land and buildings, the enjoyment of water rights, the practice of many trades and occupations and the business of manufacturing in particular localities, all fall, on some occasions in important respects within its sphere. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him *pro tanto* of the enjoyment of such property. To find conclusively against him, that a state of facts exists with respect to the use of his property or the pursuit of his business which subjects him to the condemnation of the law is to affect his rights in a vital point. The next thing to depriving a man of his property is to circumscribe him in its use, and the right to use property is as much under the protection of the law as the property itself, in any other aspect, is, and the one interest can no more be taken out of the hands of the ordinary tribunals than the other can. If a man's property cannot be taken away from him except upon trial by jury, or by the exercise of the right of eminent domain upon compensation made, neither can he, in any other mode, be limited in the use of it. The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the hand of the individual, is a common law right, and is derived in every instance of its exercise from the same source—that of necessity. It is akin to the right of destroying property for the public safety, in case of the prevalence of a devastat-

ing fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court. The finding of a sanitary committee or of a municipal council or of any other body of a similar kind, can have no effect whatever, for any other purpose, upon the ultimate disposition of a matter of this kind. It cannot be used as evidence in any legal proceeding for the end of establishing, finally, the fact of nuisance, and if it can be made testimony for any purpose, it would seem that it can be such only to show that the persons acting in pursuance of it were devoid of that malicious spirit which sometimes aggravates the trespass and swells the damages. I repeat that the question of nuisance can conclusively be decided, for all legal uses, by the established courts of law or equity alone, and that the resolutions of officers or of boards organized by force of municipal charters, cannot, to any degree, control such decision."

This review of the decisions and *dicta* in the State courts upon this question and of cases on somewhat analogous questions in the Supreme Court of the United States would seem to indicate that it is constitutional from the point of view both of the United States Constitution and of the State constitutions to vest in boards of health the power of finally determining that concrete conditions fall within a well recognized class of nuisances.

Third: Summary proceedings for abatement. Whatever doubt there may be as to powers of boards of health in other respects, there is no doubt whatever of their right summa rily and without judicial process to abate well recognized nuisances, even if such abatement results in the destruction of property. This proposition is based upon the further proposition that the things complained of are actually nuisances. While an actual nuisance may be summarily abated, any one, even a health officer, who undertakes the abatement of any thing which is not actually a nuisance, does so at his peril.

The leading case in the United States Supreme Court is Lawton *v.* Steele.[1] In this case the game warden of the

[1] 152 U. S. 133.

State of New York, the defendant, summarily abated by destroying it a nuisance consisting of fish nets placed in position to catch fish contrary to law. Action was brought against him for the value of the nets. The Supreme Court upheld the decision of the Court of Appeals of New York[1] which declared constitutional the law providing such summary abatement, but expressly limited the effect of its decision by confining the operation thereof to articles of small value. The rule of law as to the summary abatement of nuisances is best stated in the decision of the Court of of Appeals, where it is said: "The right of summary abatement of nuisances without judicial process or proceeding, was an established principle of common law long before the adoption of our constitution, and it has never been supposed that this common-law principle was abrogated by the provision for the protection of life, liberty and property in our State constitution, although the exercise of the right might result in the destruction of property."

The limitation to articles of small value, which is imposed upon this rule by the United States Supreme Court in the decision referred to, is not in accordance with the decisions of the State courts. Thus it has been held that a health authority may destroy a house which is a nuisance.[2] In this case suit was brought against the mayor of Philadelphia for having, while not acting under judicial process, demolished a building, claimed to be a nuisance. The question as to the existence of the nuisance was submitted to the jury whose verdict established the fa ct of the nuisance. In the opinion on appeal Judge Sharswood said: "The defendant was the mayor of the city and charged with the conservation of the peace and the protection of the property of the city; he was the representative of the city. It is true that a wooden building, though erected contrary to law, is not *per se* a public nuisance. But it may become such by the manner in which it is used or allowed to be used. * * * The jury under the charge of the learned judge has found these buildings to be of that character. * * * It is stated as a fact in the special plea and of course a fact admitted by the agreement that the public safety was imperiled. Nothing more was necessary to justify

[1] 119 N. Y. 226. [2] Fields *v.* Stokley, 99 Pa. St. 306.

the action of the defendant. * * * The official position of the defendant as mayor of Philadelphia did not relieve him of his personal responsibility in this respect. But he has been sustained by the verdict of the jury which is a justification of his alleged trespass. We are of opinion that this case was properly submitted to the determination of the jury, and that there was nothing in the charge calculated to mislead, and that it would have been manifest error if any judge had affirmed plaintiff's point and thereby in effect instructed the jury to find a verdict in its favor."

The State courts, however, do insist that the right summarily to abate a nuisance does not include the right to destroy any objects which are susceptible of lawful use, nor to do more than is necessary to abate the actual nuisance complained of. Thus it would be improper to demolish a house in order to abate the nuisance of a disorderly house.[1]

Finally the summary abatement of a nuisance and, much more, the order to abate may be made without notice to the person affected by it. This was held in both People *v.* The Board of Health of Yonkers[2] and Department of Health of New York City *v.* The Rector, etc. of Trinity Church.[3]

Before leaving this matter of the summary abatement of nuisances it is necessary to refer to those few decisions which have construed laws vesting in boards of health the power to remove to public hospitals persons suffering from contagious diseases. For such laws may result in a violation of the rights of personal liberty. It is rather extraordinary that notwithstanding the common existence of such statutes, the cases which have considered their constitutionality are so rare. The only case directly in point which a careful search has discovered is that of Haverty *v.* Bass.[4] In this case the statute permitted the health officers of a town, in which a person was affected with a disease dangerous to the public health, to remove such person to a separate house, provided it could be done without great danger to his health. A police officer and a city physician under the direction of the mayor of Bangor took out of

[1] Welch *v.* Douglass, 2 Doug. (Mich.) 332; see also Barclay *v.* Commonwealth, 25 Pa. St. 503. [2] 140 N. Y. 1. [3] 145 N. Y. 32. [4] 66 Me. 71.

the arms of the mother her child, who was believed to be sick with smallpox, for the purpose of removal to a city hospital. This was done without a judicial warrant, after breaking into the house, upon reasonable demand for entrance, the house having been fastened against the officers. Action was brought for trespass but the defendants justified under the statute, the constitutionality of which was upheld, and the plaintiff was non-suited[1].

In order, however, that health officers may exercise such power, it is necessary that it be granted to them clearly by the statute. Thus it has been held that a power to abate nuisances will not justify the removal of a person with a contagious disease. For in the absence of a statute to that effect, "a person sick of an infectious or contagious disease in his own house or in suitable apartments at a public hotel or boarding house" is not a nuisance.[2]

A careful search has, further, revealed no decision as to the finality of the determination of a sanitary officer as to whether a given person has a contagious disease or not. But in the case of Brown *v.* Purdy,[3] the court says: "The plaintiff was taken involuntarily from her dwelling to the smallpox hospital. This was effected by action of a sanitary inspector in conformity with the health laws. The validity and regularity of his proceedings are not questioned in this case, excepting in one respect, namely, that when the inspector examined the plaintiff to ascertain if she had smallpox her appearance and symptoms did not justify him in thinking or dreading that she had. If there was any case for his judgment, or any fact or appearance or symptom as to which a question of smallpox or not could arise, his determination was final as to the legality or propriety of removal."

Finally, it has been held[4] that a city is not responsible for damages caused by a person's acquiring smallpox in a city hospital to which he had been removed, although at the time of the removal he had only measles which had been mistaken for smallpox.

See also [1] Aaron *v.* Grailes, 64 Texas, 316. In this case it was held that after so removing a person health officers were liable to an action for damages resulting from their negligence. [2] Boom *v.* City of Utica, 2 Barb. 104.

[3] 8 N. Y. St. Rep. 143. [4] Hand *v.* Philadelphia, 8 Pa. Co. Ct. 213.

The result of the decisions upon the general subject of the summary abatement of nuisances is that, subject to the control of the courts, the legislature or its delegate may declare what are nuisances; and that administrative authorities may, without notice or a hearing, determine upon the existence of concrete nuisances and summarily abate them. In such case the determination which is reached is not, however, final, but may be reviewed by the courts in a variety of ways, when they may reverse the determination as to the existence of the nuisance and as to the propriety of the method of abatement which may have been adopted.

The remedy by injunction to restrain the action of health officers is the only really effective remedy open to individuals against such action, for the personal liability of officers, while undoubtedly exercising a deterrent effect upon them, is not usually of any value to a person who is injured by their action. The remedy by injunction is not, however, often applicable in these cases, for health officers are accustomed to act very quickly. Indeed in some cases, as, for example, under the New York charter, the issue of an injunction is not permitted except on five days' notice.[1] Such a provision naturally makes it impossible in most cases to resort to the injunction at all. Therefore the further provision contained in section 1196 of the charter, which both relieves health officers from liability for damages and imposes such a liability upon the city, is a valuable addition to the list of remedies open to the individual against the improper actions of health officers.

It is difficult to say whether it is constitutional to grant to a health board the power finally to determine whether given conditions fall within a well recognized class of nuisances, although it would appear that such a grant of power is constitutional if its exercise is conditioned upon the giving of notice and a hearing. The vesting of such powers in boards of health would seem to have been the policy of the first systematic health legislation adopted in this country, namely the health law relating to New York City, of 1866. But such a method would seem, if we are to judge by the latest decisions, not to have

[1] Section 1260 of the charter.

worked altogether satisfactorily and the present health legislation is departing from it, and, while in the interest of the public welfare in giving to health officers the power to order the abatement of nuisances and summarily to abate them without notice or a hearing, is, on the other hand, in the interest of private rights, not attempting to make final the determination of such officers that given conditions constitute a nuisance. So far as such a method is combined with corporate responsibility for damages caused by the illegal actions of health officers, it offers an efficient means of protecting the public health and an ample remedy for the violations of private rights, except in the case of contagious diseases cases. So far as reliance is based upon the injunction alone to prevent the actions of health officers from resulting in this illegal invasion of private rights, such a method is in many cases ineffective in assuring proper protection in private rights, although it amply protects the public welfare.

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